



PLMT

FILE: B-192839

DATE: May 3, 1979

10,030

MATTER OF: Earl S. Barbely -- *[Claim by Exempt Employee for]* Compensatory Time

DIGEST:

1. Exempt employee assigned to attend international conferences may be granted compensatory time in lieu of overtime for hours in excess of 8 in a day or 40 in an administrative work-week if such hours can be properly identified and officially approved. However, ~~to the extent that~~ the overtime hours for which compensatory time is granted ~~would cause~~ the employee's rate of pay to exceed the aggregate salary limitation in 5 U.S.C. 5547, for any pay period, such compensatory time was erroneously granted.
2. Compensatory time for overtime work ^{then} which is in excess of the aggregate salary limitation in 5 U.S.C. 5547 was erroneously granted and remedial action is in order. Either the employee's annual leave balance may be reduced by the amount of compensatory time erroneously granted and used; or alternatively, the Government may recoup the amount paid for compensatory time erroneously granted. Recoupment of erroneous payments may be considered for waiver pursuant to 5 U.S.C. 5584, and part 91, title 4, Code of Federal Regulations.
3. ^{It} Where the times and dates of international conferences were not scheduled by any agency of the U.S. Government, such times can be said to be administratively uncontrollable traveltime. However, ^{the} employee may not be paid overtime or given compensatory time in place of overtime for travel time to and from such conferences if there was sufficient

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advance notice of the times of such conferences so as to permit scheduling related travel during the employee's regular duty hours without incurring more than 1-3/4 days' additional per diem expenses. *He is entitled*

4. Employee may be permitted to remain in duty status during authorized rest periods en route to ^{temporary duty} location ~~to the extent that such~~ rest periods were required, because of his travel itinerary, to be scheduled during his regular duty hours. *There is no authority, however, which would authorize or permit payment of overtime compensation or compensatory time for rest periods which fall outside of regular duty hours. ~~is not authorized~~*

This action concerns the request of Wayne B. Leshe, an authorized certifying officer of the Federal Communications Commission (FCC), for a decision concerning compensatory time claimed and used by Earl S. Barbely, an employee of FCC.

Mr. Barbely, a GS-15 employee, exempt from coverage under the Fair Labor Standards Act, was assigned to attend conferences held by the International Telecommunications Union at Geneva, Switzerland, and other foreign cities. The times, dates and locations of the conferences varied. The agency report states that they could be scheduled during the employee's scheduled work hours, in the evening, at night, or on Saturday and Sunday. They were scheduled by international organizations and were not administratively controllable by the FCC or other agencies of the United States Government.

During the period February 4, 1978 to July 3, 1978, while assigned to attend these international conferences, Mr. Barbely claimed and used a total of 50 hours of compensatory time. His time and attendance reports show that his regular tour of duty was Monday through Friday, 7:45 a.m. to 4:15 p.m. The record

shows the dates for which compensatory time was claimed and used, but does not show the hours claimed, and does not differentiate between time spent attending conferences, preparing for conferences, or traveling to and from conferences. Further, the record does not show the schedule of conferences attended, or Mr. Barbely's travel itinerary.

Based upon the above information, the agency asks the following questions:

- "1. May an exempt employee receive compensatory time off or overtime pay for the time spent in international meetings in the evening, at night or on Saturday and Sunday if that time spent is in excess of his normal 40 hour work-week?
- "2. May an exempt employee receive compensatory time off or overtime pay for travel time enroute to international meetings if that travel time is in excess of his normal 40 hour work-week?
- "3. Are 'rest periods' given after a flight of 10 hours or more, considered as 'work time' in computing time worked in the computation of an employee's normal 40 hour work-week?
- "4. Is time spent in preparing for the meeting at the meeting location considered as 'work time' in computing the normal 40 hour work-week?
- "5. If an employee is put on a special work schedule, consisting of the first 40 hours worked as an 'official work-week' then would:
 - "A. Travel time and waiting time be considered as work?
 - "B. Would 'rest periods' be considered as work?

"C. Would time spent preparing for the meeting, at the meeting location, be considered as work?

"D. Would attendance at informal and formal delegation meetings during the day, in the evening, at night on Saturday and Sunday be considered as work?"

Question 1. Compensatory time for attendance at conferences.

An agency may grant compensatory time or pay overtime compensation to exempt employees for irregular or occasional overtime work pursuant to 5 U.S.C. 5543(a) (1976). Entitlement to compensatory time is governed by the same requirements applicable to entitlement to overtime compensation paid pursuant to 5 U.S.C. 5542(a). Generally, these requirements are that the overtime work (1) must be officially ordered and approved; (2) must be in excess of 40 hours in an administrative workweek or 8 hours in a day; and (3) must involve the actual performance of work except that time spent in authorized leave with pay status during the basic workweek does not reduce an employee's entitlement to overtime compensation, or compensatory time, which would be otherwise due. 25 Comp. Gen. 254 (1945); 46 id. 217 (1966); 42 id. 195 (1962).

However, compensatory time granted to an employee instead of payment for irregular or occasional overtime work pursuant to 5 U.S.C. 5543(a) is subject to the aggregate salary limitation in 5 U.S.C. 5547. 37 Comp. Gen. 362 (1957). In pertinent part, that section provides that an employee may be paid premium pay only to the extent that the payment does not cause his aggregate rate of pay for any pay period to exceed the maximum rate for GS-15. The procedure for computing the maximum number of hours of compensatory time which may be credited to an employee in one pay period is set forth at 37 Comp. Gen. 362 at 364.

As the above applies to Mr. Barbely's claim, it appears that the agency may grant Mr. Barbely compensatory time for the hours attributable to attendance at conferences which were in excess of 8 hours a day or 40 hours in an administrative workweek, if such hours can be properly identified and officially approved. Of course, if the overtime pay for which compensatory time is claimed would cause his rate of pay to be in excess of

the aggregate salary limitation for any pay period, such compensatory time was erroneously granted and remedial action is in order. Either the employee's annual leave balance may, with his consent, be reduced by the amount of compensatory time erroneously granted and used or, alternatively, the Government may recoup the amount paid for compensatory time erroneously granted. Recoupment of the salary paid for the leave erroneously taken may be considered for waiver pursuant to the provisions of 5 U.S.C. 5584, and part 91, title 4, Code of Federal Regulations.

Question 2. Compensatory time for travel to and from conferences. Payment for time spent by an exempt employee in a travel status is governed by 5 U.S.C. 5542(b)(2), which provides in pertinent part as follows:

"(b) For the purpose of this subchapter--

* * * * *

"(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless--

"(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

"(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

An agency may grant compensatory time or pay overtime compensation for travel performed outside an employee's regular workday or workweek only if one or more of the conditions set forth in section 5542(b)(2)(B) have been met. B-172671, March 8, 1977. This applies equally to the initial travel and the return trip. 51 Comp. Gen. 727, 732 (1972); B-172671, supra.

As the above applies to Mr. Barbely's claim, it is necessary to first identify those hours of claimed compensatory time attributable to travel to and from the conferences, and the dates and times of the conferences. If such times are identified, one of the conditions of section 5542(b)(2) has been partially met. That is, since the conferences were not scheduled by the employee's agency, it can be said that the times and dates of the conferences were not administratively controllable. See FPM Supplement 990-2, Book 550, Subchapter 1-3 (July 1969). That fact alone is not sufficient, however, where there has been advance notice of the dates and times of the conferences. If there was sufficient advance notice of the times and dates of the conferences so as to permit scheduling related travel during Mr. Barbely's regularly scheduled hours without incurring more than 1-3/4 days' per diem expenses, Mr. Barbely would not be entitled to compensatory time or overtime for time spent traveling during nonduty hours. 50 Comp. Gen. 674 (1971); 56 Comp. Gen. 847 (1977). [He is entitled to compensatory time or overtime only if travel to or from a conference during his regularly scheduled hours would result in the payment of at least 2 additional days' per diem expenses.]

Question 3. Rest periods as hours worked. Agencies may, by regulation, authorize rest stops en route where an employee would otherwise be required to travel for an extended period of time without interruption. For example, see subsection 132.4 of the Foreign Service Travel Regulations, Volume 6, Foreign Affairs Manual; and paragraph C4464-4, Volume 2, Joint Travel Regulations. See also, 56 Comp. Gen. 629 (1977) for a discussion of rest periods permitted in connection with travel governed by the Fly America Act.

When such rest periods are authorized, an employee may be permitted to remain in duty status to the extent that such a rest period must, because of his travel itinerary, be scheduled during normal duty hours. However, hours attributable to rest periods occurring outside an employee's regularly scheduled duty hours are already allocated to the employee's personal use, and become hours of work only if the requirements of 5 U.S.C. 5542(a), or 5542(b)(2)(B), supra, have been met.

Rest periods during nonduty hours are not overtime or hours of work within the meaning of section 5542(a) because they do not

involve the actual performance of work. Similarly, such rest periods do not fall within the purview of section 5542(b)(2)(B)-- overtime for time in travel status -- because an employee is in travel status only for those hours actually spent traveling, and for usual waiting periods necessary to make connections in ordinary travel situations. B-175082, April 20, 1972. Thus, for purposes of section 5542(b)(2)(B), an employee is not in travel status during rest periods.


As the above applies to Mr. Barbely's claim it appears that he may be permitted to remain in duty status during authorized rest periods en route to the extent that such rest periods were, because of his travel itinerary, scheduled during his regular duty hours. We are aware of no authority which would authorize or permit payment of overtime compensation or compensatory time for rest periods which fall outside of his regular duty hours. Of course, his entitlement to per diem would not be interrupted by authorized rest periods. See, generally, Federal Travel Regulations (FPMR 101-7) para. 1-7.5 (May 1973).

4. Preparation for meetings as hours worked. The record contains no information as to what preparation for meetings entails and we are, therefore, unable to determine if such preparation can be viewed as hours of work or hours of employment. Moreover, it appears that this issue is primarily for determination by the agency involved. See, B-181237, April 15, 1975, and November 1, 1977 (57 Comp. Gen. 43).

5. First 40 hour workweek. Employees may be placed on a first 40 hour workweek pursuant to the provisions of 5 C.F.R. 610.111(b), which provides as follows:

"(b) When it is impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled administrative workweek, the head of an agency may establish the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek as the basic workweek, and additional hours of officially ordered or approved duty within the administrative workweek are overtime work."

The question of what constitutes hours of duty within the meaning of this provision must be determined on the basis of the facts and circumstances of a particular case. In the absence of any information as to the specific nature of Mr. Barbely's assignment, the duties expected of him, the times and dates of the conferences, and his travel itinerary, we are unable to respond to the questions posed regarding a first 40 hour week. See, however, 55 Comp. Gen. 994 (1976) and 57 Comp. Gen. 43 (1977) for general information.


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